

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition of the SBC Companies for)
Forbearance from Regulation as a Dominant Carrier) CC Dkt 98-227
for High Capacity Dedicated Transport)
Services in Specified MSAs)

COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion"), by its undersigned attorneys, pursuant to the Commission's Public Notice,¹ hereby respectfully submits the following comments on the above-referenced petition filed by the SBC Companies ("SBC"). Hyperion is a leading provider of integrated local telecommunications services over state-of-the-art fiber optic networks in selected markets in the United States. Hyperion operates in 20 geographic markets serving 46 cities, including more than 5,463 route miles of fiber and 17 Lucent 5ESS switches in 11 states. Hyperion has bought or secured an additional 8,100 route miles of fiber optics which it expects to use in 50 new markets in the Eastern United States to operate an advanced regional fiber network.

Hyperion requests that the Commission deny SBC's Petition. First, it would be inappropriate for the Commission to consider SBC's Petition separate from other proceedings already addressing pricing flexibility issues. Thus, in the *Access Charge Reform Proceeding*, the Commission is addressing, among other issues, the appropriate criteria for granting pricing flexibility. SBC's requests are more appropriately considered within the context of that proceeding. Second, even if

¹ *Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas*, CC Docket No. 98-227 (December 8, 1998).

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the Commission does consider SBC's Petition, it must deny SBC's forbearance request. SBC has plainly failed to demonstrate that it has met either an appropriate standard for granting pricing flexibility or has met the statutory forbearance standard.

I. The SBC Request Prejudges Pricing Flexibility Issues

The SBC Petition requests that the Commission issue a sweeping forbearance that would relieve SBC from dominant carrier regulation with respect to high capacity dedicated transport services in portions of 14 Metropolitan Statistical Areas ("MSAs"). SBC's Petition, however, involves the very issues the Commission is currently considering in its *Access Charge Reform Proceeding*. Although SBC claims that the docket in the *Access Charge Reform Proceeding* is out of date, just several months ago, the Commission released a public notice requesting parties to update and refresh the record in that docket.² The issues the Commission asked parties to update specifically concerned pricing flexibility. In particular, the Commission requested comments on pricing flexibility proposals submitted by Bell Atlantic and Ameritech, which had requested substantial modifications from the Commission's pricing flexibility proposed guidelines. It would, therefore, be premature for the Commission to rule on the SBC Petition until permanent pricing flexibility criteria are considered in the proceeding where the Commission has sought to establish a record that would enable it to do so.

Moreover, it would be particularly inappropriate to consider SBC's request outside of the *Access Charge Reform Proceeding*, since granting SBC's request would essentially eviscerate the

² *Commission Asks Parties to Update and Refresh Record For Access Charge Reform and Seeks Comment on Proposals For Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256, released October 5, 1998.

phased approach to pricing flexibility envisioned by the Commission. In its *Access Charge Reform NPRM*,³ the Commission proposed a phased approach to pricing flexibility, in which various regulatory requirements will be removed upon the RBOC demonstrating various levels of competition. The Commission set forth particular conditions that would have to be met before the RBOC would be eligible for each stage of increased pricing flexibility.

However, instead of demonstrating the existence of the conditions necessary to qualify for even Phase 1 pricing flexibility, which is the "potential competition" phase, the SBC Petition recommends skipping directly to total pricing flexibility. To be eligible for Phase 1 pricing flexibility, SBC would need to demonstrate that substantial barriers to entry in its market have been removed -- essentially showing that it has complied with many of the requirements of the Section 271 checklist.⁴ SBC has made no such showing. Instead, by proclaiming that vast competition is present in those 14 MSAs, SBC attempts to circumvent the Commission's regulations and move directly to the end stage of pricing flexibility. Because SBC has failed to demonstrate that it is eligible for Phase 1 pricing flexibility, *i.e.* it hasn't even attempted to establish that it has

³ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, 11 FCC Rcd 21354 (1996) ("*Access Charge Reform NPRM*").

⁴ Specifically, the Commission mentioned, among others, the following conditions: (1) unbundled network element prices are based on geographically deaveraged, forward-looking economic costs; (2) transport and termination charges are based on the additional cost of transporting and terminating another carrier's traffic; (3) wholesale prices for retail services are based on reasonably avoidable costs; (4) dialing parity is available; (5) number portability is available; and (6) CLECs have access to ILEC rights-of-way. See *Access Charge Reform NPRM*, at ¶ 163.

significantly removed the barriers to entry into its market, the Commission should deny SBC's request to completely forbear from regulation for high capacity service.

III. SBC Has Not Shown That It Does Not Have Market Power in the 14 MSAs Indicated

Even if the Commission does entertain SBC's requests, it should deny its Petition on factual grounds. Although SBC argues that it is subject to substantial competition in those 14 MSAs listed, it has failed support its allegations with documented evidence.

Although SBC submitted the *Quality Strategies Study*, that Study provides little help in ascertaining the actual market shares in each of the MSAs studied. More specifically, the Study fails to explain how exactly the market share was estimated. For example, if the Study based the percentage of market share on DS-1 equivalents, such an analysis would not provide a reasonable basis for estimating market share. This is because a few DS-3 services provided by various competitors could translate into a large percentage of DS-1 equivalents, even though such competitors may only have a very modest facilities-based presence and may only be serving a few customers in a few locations. Indeed, the *Quality Strategies Study* does not even attempt to make a comparison on other factors which should be considered as part of any indication of the presence of competition, such as shares of high capacity revenues, customers or facilities. Accordingly, the Commission cannot make any rational evaluation of market share based on the *Quality Strategies Study* because the Study fails to provide a complete picture of the status of competition in the various markets.

Moreover, SBC fails to support its assertions regarding demand and supply elasticity. Specifically, SBC argues that because the customers for high capacity transport are large customers, demand must be elastic. However, SBC fails to provide evidence of alternatives that would be

sufficient to constrain LEC prices. Simply by asserting that the customers are sophisticated users does not prove that SBC would not have the ability to charge monopoly based prices, unless there are sufficient alternatives. SBC has failed to clearly demonstrate the presence of such competitive alternatives.

Similarly, SBC's claims with regard to supply elasticity are without merit. SBC argues that there is supply elasticity in the high capacity transport market because competitive carriers have a sufficient amount of fiber to meet demand. However, again, SBC fails to back up its claims with facts. Although competitors may have fiber miles, it does not mean that they have the ability to quickly meet increased customer demand.

Contrary to SBC's claims, it continues to currently possess an unfair advantage in the market by virtue of its size and resources. While it is true that some of the companies SBC refers to are large companies, such as AT&T and MCI WorldCom, virtually all of SBC's competitors are at least partially dependent on some SBC facilities for the provision of local services. Accordingly, SBC enjoys market power by virtue of its size and resources.

Hyperion points out that incumbent LECs, including SBC, continue to dominate the market for local services. Objective measures of competition show that overall incumbent LECs continue to possess nearly 95% of the local service market.⁵ The Commission should not even entertain the

⁵ Collectively, CLECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategies Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997).

idea of the substantial deregulation SBC suggests until competitive LECs have made more than a minor dent in incumbent LECs' overwhelming share of the market.

IV. The Requested Relief is Too Broad

To the extent the Commission entertains SBC's request for deregulation, the Commission must be careful to narrowly tailor any pricing flexibility it grants to SBC. The relief requested by SBC is overly broad and would open the door for it to engage in anticompetitive behavior. Indeed, SBC has failed to provide any assurance that it would not use forbearance as an opportunity to raise prices in markets where there is less competition to make up for rate reductions it makes in response to competition in more competitive areas. Hyperion submits that such a broad grant of pricing freedom would harm competition by providing SBC with the ability to engage in anticompetitive pricing strategies.

V. The SBC Petition Does Not Meet the Standards for Forbearance Under Section 10

Section 10 of the Telecommunications Act requires the Commission to make the following findings prior to forbearance of any regulation: (1) enforcement of such regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable; (2) enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.


SBC has predicated its Petition on bald claims that significant competition exists in the high transport services market. However, as demonstrated above, the market study proffered by SBC is too vague to demonstrate any significant competition in the indicated markets. Without proven competitive restraints, tariffing of high capacity services is necessary to assure that SBC's prices for

those services are just and reasonable. In addition, dominant carrier regulation is necessary to restrict SBC's ability to behave anticompetitively. Accordingly, forbearance is not in the public interest, as regulation continues to be necessary to ensure the reasonableness of prices and to prevent anticompetitive behavior.

IV. CONCLUSION

Hyperion urges the Commission to deny SBC's Petition for forbearance from dominant carrier regulation in the fourteen MSAs specified. At this time, forbearance from regulation in the high capacity dedicated transport service market would be contrary to the public interest. In particular, Hyperion is concerned about unintended, undesirable consequences of premature deregulation. First, premature deregulation could foreclose competition by CLECs by giving SBC the ability to engage in anticompetitive pricing strategies such as by raising prices in markets where there is less competition to make up for price reductions in more competitive areas. Second, premature deregulation could ultimately make telecommunications services unaffordable to consumers as higher interstate access service prices are passed on to consumers. Because other service markets are geared more toward residential consumers instead of businesses and IXC's, the average consumer will have to pay higher costs for allowing SBC increased flexibility in the product area that serves the most lucrative customers. Accordingly, Hyperion urges the Commission to permit competitive forces to fully develop throughout the local exchange market prior to granting SBC and other RBOCs pricing flexibility or forbearance of the type sought in the instant petition.

Respectfully submitted,



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Dated: January 21, 1999

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CERTIFICATE OF SERVICE

I hereby certify on this 21st day of January, 1999 that a copy of the foregoing Comments of Hyperion Telecommunications, Inc. has been served on each party listed below by hand delivery:

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